



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

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December 9th, 1998

Minutes of the December 9th, 1998, meeting of the Commission on Governmental Ethics and Election Practices held in Room 315, State Office Building, Augusta, Maine.

Present: Chairman Peter B. Webster; Members Harriet P. Henry, G. Calvin Mackenzie, and Merle R. Nelson; Director William C. Hain, III; Counsel Phyllis Gardiner; and Candidate Registrar Dottie Perry.

Absent: Member Linda W. Cronkhite.

Chairman Webster called the meeting to order at 9:30 a.m.

In keeping with the Commission's practice of addressing agenda items out of scheduled sequence in order to accommodate members of the public who may be present and have requested a Commission determination of their respective issues, the following agenda items were considered:

Agenda Item #11A: Legislative Ethics Complaint

Chairman Webster recused himself from consideration of this agenda item due to a professional conflict of interest, designating Mr. Mackenzie to act as Chair in his stead. Mr. Mackenzie assumed the position of Chair for purposes of consideration of this item. Mr. Mackenzie moved, Mrs. Nelson seconded, and it was unanimously voted to go into executive session to consider the complaints filed against two Legislators for alleged undue influence. After consideration of the complaints, the responses thereto by the subjects of the complaints, and the applicable statutory authority by the Commission, Judge Henry moved, Mrs. Nelson seconded, and the Commission unanimously voted to dismiss the complaints for failure to establish a violation of the State legislative ethics laws. Thereafter, Judge Henry moved, Mrs. Nelson seconded, and it was unanimously voted to go out of executive session. Mr. Webster resumed the position of Chair for the balance of the meeting deliberations.

Agenda Item #6A: City of South Portland v. Management Research & Development Association (MRDA)(Paul A. Volle, President)

Paul A. Volle appeared on behalf of MRDA. Attorney Gardiner initiated the discussion of this issue by addressing the question whether the Commission has jurisdiction over complaints

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arising from municipal referenda elections. She discussed the provisions of 30-A M.R.S.A. § 2502, informing members of the applicability of Title 21-A, chapter 13, subchapter IV (campaign reports and finances by political action committees) to municipalities with populations over 15,000. She concluded that the Commission has jurisdiction for enforcement of those provisions while qualifying municipalities perform the administrative functions of the Commission with respect to the statutory reporting requirements.

Mr. Volle then addressed the Commission to explain why MRDA was not subject to the registration and reporting requirements of Title 21-A, chapter 13, subchapter IV as a political action committee. He first distributed a copy of letters dated October 30, 1998 to the South Portland City Clerk (previously distributed) and December 9, 1998 to the Commission. He advised the Commission that *The Gay Agenda* is a "newspaper" that included 19 paid advertisements, that it had been distributed not only in South Portland, but also in Falmouth, and that it will be published periodically with a gradually wider distribution throughout the State. He summarized his letter to the Commission, concluding that MRDA had not violated any State law because it had not engaged in "express advocacy." Moreover, he stated, as a published newspaper tabloid, the publication qualified for the expenditure exception provided by § 1052(4)(B)(1). He stated that if MRDA qualified as a political action committee by publication of *The Gay Agenda*, then other newspapers in the State also would have to be registered as political action committees. He stated that it is MRDA's opinion that there is a need for this type of publication in the State and that the publication made a profit after expenses of approximately \$275, from advertisements paid for by political action committees and candidates. He asserted that *The Gay Agenda* was intended as an informative newspaper, even if some articles may have tended to editorialize. He insisted that it is vital to maintain a full and free discourse on political issues, which discourse is Constitutionally protected speech.

Judge Henry inquired about the "express advocacy" nature of some of the articles. Mr. Mackenzie explored the issue of "express advocacy," to which Mr. Volle responded that the editorial nature of some of the articles did not differ appreciably from the content of such newspaper publications as the *Portland Press Herald* or the *Casco Bay Weekly*. Mr. Mackenzie asked whether the MRDA publication addressed any issues other than gay rights, to which Mr. Volle responded in the negative. Asked whether there would be other issues, Mr. Volle responded that MRDA was trying to publish again in February 1999 with an expected distribution area to include South Portland, Portland, Falmouth, and the Lewiston/Auburn areas.

Mr. Mackenzie asked whether the newspaper is separate from MRDA, and Mr. Volle responded that it is a publication of MRDA. In response to Mr. Mackenzie's question whether MRDA belongs to any trade associations, Mr. Volle responded in the negative. Mr. Mackenzie further inquired about how the publication at issue here is like other newspapers, given the fact that there has been only one issue to date, that it has focused exclusively on the subject of gay rights, and it was distributed only in the geographical areas in which there were political issues relating to gay rights in the last election. Mr. Volle responded that the publication was a special interest newspaper intended to inform in factual columns, including legal analyses by attorneys, as a vehicle for the education of its readers.



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Mrs. Nelson inquired about an article written by Paul Madore encouraging readers to “vote ‘no’ on Tuesday,” referring also to other advertisements saying “vote ‘no’”, but including an attribution statement with them. She suggested that it appears that there was no other reason to publish than to advocate a “no” vote. Mr. Volle did not concede that point, but instead stated that the purpose was to educate citizens concerning the long range effect and impact of the gay lifestyle. He stated that the reason for publishing *The Gay Agenda* is to inform the public in order to fill a void because no other publication is doing that. He noted that there is a lot of gay agenda advocacy that is not being countered, and that facts are being omitted or ignored by other publications. He stated that MRDA’s publication is not specifically designed to advocate in only one geographic area or to one issue, but rather that MRDA intends to expand both the issues to be covered and the distribution area to be served.

Judge Henry again raised the question about Paul Madore’s statement to “vote ‘no’ Tuesday,” to which Mr. Volle responded that the article referred to included Paul Madore’s thoughts based on Mr. Madore’s prior involvement in Lewiston.

Mr. Mackenzie inquired about the funding cost of the publication, to which Mr. Volle responded that the estimated publication cost was \$906, with a distribution cost of \$627, totaling \$1,533 that MRDA paid from funds received from the sale of advertisement space to political action committees and candidates such as Mr. Longley and Mr. Greiner. Mr. Mackenzie also asked Mr. Volle to explain how he believed MRDA is not a political action committee under the definition of a PAC contained in Section 1052(5)(A)(1), to which Mr. Volle responded that MRDA engaged in free speech that was protected by the Constitution. Mr. Mackenzie stated that this is not an exercise of free speech issue, but rather a registration and reporting issue intended to inform citizens of who is speaking and paying for that speech.

Mrs. Nelson requested clarification of the issues being considered, to which Mr. Hain responded that the question is whether MRDA, by engaging in “express advocacy,” qualified as a political action committee that was required to register as such and file campaign finance reports in accordance with State law. Mrs. Nelson then moved and Judge Henry seconded that MRDA did qualify as a political action committee. However, after brief discussion, that motion was withdrawn. Thereafter, Mr. Mackenzie moved, Judge Henry seconded, and members unanimously voted to table the matter until the next meeting in January 1999 and directed staff and counsel to brief the issue of what constitutes a political action committee according to the statutes and interpretive cases.

Agenda Item #6B: Smith v. Lewiston Mill Redevelopment Corporation (LMRC)(Robert Mulready, Director)

Robert S. Hark, Esq., appeared as City Attorney on behalf of the City of Lewiston and LMRC, referring the Commission to his letter dated November 18th, 1998, upon which he elaborated by giving a brief history of the Bates Mill Project from the early 1990s to the present referendum. He indicated that, in response to citizen complaints that they had not been kept fully informed, the publications at issue before the Commission had been prepared by a commercial communications consultant, Nancy Marshall Communications, whose letter dated December 4,



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1998, he presented to the Commission for its consideration. Attorney Hark noted that he personally reviewed all communications prepared by the paid consultant before they were published to ensure that they did not expressly advocate a particular position because of his concern that the publications were being publicly funded. Under that circumstance, he stated, it would be inappropriate for publicly-funded publications to attempt to influence voters in any particular direction. That included review of a letter signed by the Mayor that Attorney Hark edited to avoid any appearance of advocacy in its content. He concluded that it was not the purpose of LMRC to influence any referendum question.

Judge Henry inquired about whether the postcards included in Ms. Smith's complaint were at issue, to which Mr. Hain responded that they would be addressed in agenda item #6C. Judge Henry then moved, Mr. Mackenzie seconded, and members voted unanimously to dismiss the complaint because LMRC had not engaged in any "express advocacy" and therefore did not qualify as a political action committee within the statutory definition.

Agenda Item #6D: Jones v. "Keep ME. Posted" (Wilbur (Bud) Landry, President)

Mrs. Nelson raised the question about whether she should recuse herself from consideration of this matter because she had formerly served on a committee with Ms. Jones. The Commission members determined that there was no conflict of interest regarding the instant matter, and Mrs. Nelson would not be required to recuse herself from its consideration.

Former State Representative Sharon Libby Jones read a statement regarding a flyer distributed by Wilbur (Bud) Landry on behalf of a group called "Keep ME. Posted," which flyer refers to Mr. Landry as President. Ms. Jones stated that the flyer was a distortion of her position on private property issues, and that it contained no attribution statement. Consequently, she had not been able to respond to it. She noted particularly the use of the term "enemy" in reference to her. The question is whether the communication expressly advocated the defeat of Ms. Jones thereby requiring the group to register as a political action committee if Mr. Landry had expended more than \$50 for production and distribution of the communication. The group had not so registered.

Wilbur (Bud) Landry appeared on his own behalf and addressed the Commission. Mr. Landry noted that Ms. Jones had taken him to task for referring to her as an "enemy" of private property, and thereafter he presented a point-by-point defense of the content of the flyer, supporting each point with documentation and citations to circumstances that he asserted supported his conclusion regarding Ms. Jones position on private property issues. Mr. Landry noted that the flyer does not advocate that the reader vote either for or against any particular person. He stated that the flyer was intended as an informative flyer, signed by himself as the President (and only officer and member) of "Keep ME. Posted." When asked by members about the cost to him to produce and distribute the flyer, Mr. Landry responded that he purchased 10 packs of paper costing a total of approximately \$20, made approximately 700 copies using less than 2 packs of the paper, estimating that the cost of paper did not exceed \$6.00. He purchased toner that cost approximately \$6.00 for the copier that he already owned, but did not use the toner. He estimated that he used approximately \$2.00 worth of automobile gasoline to distribute the flyers that were handed out in front of the IGA store in Dover, and that he got help in Greenville in



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distributing the flyers. He estimated that he did not spend any more than \$20 total for the production and distribution of all of the flyers.

Judge Henry stated that she understood Ms. Jones' concern about the use of the word "enemy," and when asked how he defined the term "enemy," Mr. Landry responded that by that term he had meant an "opponent or adversary."

Counsel Gardiner reviewed the framework of the statute applicable to this question, particularly the significance of the question about how much Mr. Landry had spent to produce and distribute the flyer, the implications of that fact on the obligation to register and report as a political action committee, and the fact that Mr. Landry was not an opponent of the candidate in this case.

Mr. Mackenzie then moved and Judge Henry seconded to dismiss the complaint. During discussion, Ms. Jones insisted that she believed that Mr. Landry had spent more than the \$20 he had indicated on the production and distribution of the flyers. She also inquired about the meaning of the term "membership organization," which Chairman Webster explained. Mrs. Nelson inquired of Mr. Landry whether "Keep ME. Posted" in reality was just Mr. Landry, and not really any kind of organization. Mr. Landry responded that he resented Ms. Jones' implication that he was being dishonest about the cost of producing and distributing the flyers. The motion was then voted unanimously.

Item #7C: Ms. Esther Lacognata Late Campaign Finance Report (CFR)

Judge Henry and Mrs. Nelson recused themselves from consideration of this matter because of personal conflicts of interest. Ms. Lacognata appeared on her own behalf and referred to her letter dated November 17th, 1998, explaining the reasons for the late submission of her report, acknowledging no mitigating circumstances within the statutory definition. After consideration of Ms. Lacognata's letter and oral statement, Mr. Mackenzie moved, Chairman Webster seconded, and the motion was voted unanimously to assess the staff recommendation of a \$78.06 penalty, reducing the original amount by one-half consistent with the Commission's previous determinations on first time violations.

Item #8A: Maine State Employees Political Action Committee (PAC)(Richard Trahey, Associate Executive Director) Late CFR

Mr. Trahey appeared on behalf of the Maine State Employees PAC, acknowledging that he is personally and solely responsible within that organization for submission of the required reports, although he is not the Treasurer of record. He requested Commission consideration of the fact that the PAC's first violation had occurred during the January 1998 ice storm, that it was not clear how the penalty would be computed for repeat violations where the previous violation had been related to the ice storm, and the fact that the failure in this case had been due to an internal procedural breakdown that has been addressed to avoid future late submissions. Judge Henry inquired about the nature of the PAC's notification about the effect of the ice storm on future penalties, and Mrs. Nelson suggested that because the ice storm had been an act of "nature," a waiver had been granted on all ice storm related late submissions. Mr. Mackenzie moved, Judge



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Henry seconded, and members unanimously voted to establish as Commission policy that reports received late during the ice storm in January 1998 would not be considered as a first violation for application of a second violation penalty such as in this case, resulting in the application of a 1% (versus 3%) penalty in this case, which amount would then be reduced by one-half, applying the Commission's practice in first violation cases, thereby resulting in the assessment of a penalty of \$843.36 in this case.

Agenda Item #1: Minutes

Judge Henry moved, Mr. Mackenzie seconded, and it was unanimously voted to accept the minutes as prepared for the November 16th, 1998 meeting.

Agenda Item #2: Acceptance of Gifts Policy Statement

Members agreed to table this item for consideration at the next meeting.

Agenda Item #3: Reconsideration of Holt Penalty Amount

Mr. Hain informed members that Ms. Holt's originally assessed penalty of \$610.08 had not been reduced because she had not specifically requested a Commission determination. Therefore, Judge Henry moved, Mrs. Nelson seconded, and it was unanimously voted to apply the Commission's practice and reduce that amount to a final penalty of \$305.04.

Agenda Item #4: Installment Payment Policy

Members agreed that the arrangements for installment payment of penalties should be within the administrative determination of the staff.

Agenda Item #5: Municipal Referenda Enforcement Jurisdiction

Counsel Gardiner had addressed this item in conjunction with consideration of agenda item #11A, but she reiterated that the applicable statutory provisions could be clarified. Members suggested that clarification of the applicable provisions should be accomplished as part of the Commission's omnibus legislative proposal submitted for consideration by the 119th Legislature.

Agenda Item #5A: Libra Grant

Mr. Hain reported that the Libra Foundation was unable to grant the Commission's application for grant funds to assist in financing the electronic filing project.

Agenda Item #6C: Poulin v. "Citizens for Local Jobs and Opportunities"

Mr. Hain distributed a copy of a letter from Robert D. Stone, Treasurer, acknowledging that the communication at issue inadvertently violated 21 M.R.S.A. Section 1055 by failing to include



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the required attribution statement. Mrs. Nelson moved, Mr. Mackenzie seconded, and members unanimously voted to assess a \$100 penalty for failure to include the required attribution statement.

Agenda Item #7A: Goldthwaite Late CFR

Mr. Mackenzie moved, Mrs. Nelson seconded, and members unanimously voted to accept the staff recommendation and assess a \$40.53 penalty, reducing the original penalty amount by one-half in recognition of the first violation.

Agenda Item #7B: Rutan Late CFR

Judge Henry moved, Mr. Mackenzie seconded, and member unanimously voted to accept the staff recommendation and assess a \$30.21 penalty, reducing the original penalty amount by one-half in recognition of the first violation.

Agenda Items #9A-9D: Delinquent Campaign Finance Reports

Commission Members unanimously accepted the staff recommendation to refer the delinquent campaign finance reports of the Independent Party of Maine PAC (2), Save Our Homes, Inc. PAC, and Congressional Term Limits Coalition to the Attorney General for appropriate action.

Agenda Item #10: Ethics Seminar

Chairman Webster briefed members on the joint presentation by the Attorney General and the Ethics Commission to the Legislature on December 1, 1998.

Agenda Item #12: Commission Membership

Chairman Webster and Judge Henry expressed a willingness for continued service on the Commission if reappointment is offered by the Governor.

Agenda Item #13: Senator Murray Request

Commission members approved Mr. Hain's request for authority to respond to State Senator Robert E. Murray, Jr.'s request for an advisory opinion regarding representation of a client by an attorney acting in his professional capacity before a State Commission, using the substantive text of previous correspondence on the same issue interpreting 1 M.R.S.A. 1014(2)(A)(1) as the basis for the response letter to Senator Murray.

Chairman Webster informed members that during the initial executive session while he had been out of the Commission meeting room, Senator Richard J. "Spike" Carey had informed the Chairman of the Senator's intent to introduce legislation to prohibit Legislators from intervening in actions before certain Boards and Commissions.



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Agenda Items #11B & 11C: Status of Pending Litigation

Mrs. Nelson moved, Mr. Mackenzie seconded, and members voted unanimously to go into executive session to receive reports from the Commission Counsel on the status of pending litigation against the Commission challenging the present lobbyist registration fees and the Maine Clean Election Act. Following the briefing on those matters, Mr. Mackenzie moved, Mrs. Nelson seconded, and members voted unanimously to go out of executive session.

On motion and unanimous agreement, the Commission adjourned at 1:15 p.m.

Respectfully submitted,

William C. Hain, III
Executive Director